

# **AGENDA ITEM**

**123 NOVEMBER 2016**

**DATE:** November 1, 2016

**TO:** Members, Regulation and Discipline Committee  
Members, Board of Trustees

**FROM:** Gregory Dresser, Interim Chief Trial Counsel

**SUBJECT:** Proposed Amendment to Rule 5.441(A) of the Rules of Procedure of the State Bar of California Relating to the Filing Requirements for Reinstatement Proceedings. Request for Adoption Following Second Public Comment Period.

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## **EXECUTIVE SUMMARY**

At its November 19, 2015, meeting, the Regulation and Discipline Committee approved circulating for public comment a proposal to amend rule 5.441(A) of the Rules of Procedure of the State Bar, and to adopt an authorization and release to facilitate the investigation of a petitioner seeking reinstatement to the Bar after disbarment or resignation. Thereafter, the Office of Chief Trial Counsel (OCTC) received four public comments during a 75-day public comment period. At its July 2016 meeting, the Regulation and Discipline Committee requested the Office of General Counsel (OGC) to conduct further review of an issue raised by two of the commentators. OCTC modified the authorization and release based on OGC's input and requested an additional 30-day public comment period, approved by the Board of Trustees at its September 2016 meeting. No comments were received during this second public comment period. OCTC recommends that the Regulation and Discipline Committee and the Board of Trustees adopt the rule and the authorization and release without further change.

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## **BACKGROUND**

A party seeking reinstatement to membership in the State Bar after disbarment or resignation ("reinstatement petitioner" or "petitioner") must, among other things, establish present moral qualifications for reinstatement, pursuant to rule 5.445 of the Rules of Procedure. If the petitioner seeks reinstatement after disbarment or resignation with charges pending, the petitioner must also establish rehabilitation from prior misconduct.

A petitioner initiates reinstatement proceedings by filing a verified petition with the Clerk of the State Bar Court and complying with service and pre-filing requirements set forth in rule 5.441. Along with the petition, the petitioner must serve OCTC with a Disclosure Statement Supporting Petition for Reinstatement. This form requires the reinstatement petitioner to disclose information about: (a) other jurisdictions in which the petitioner has been admitted to practice law, including any discipline recommended in such other jurisdictions; (b) medical, dental, real

estate, stock brokerage, securities, and similar professional licenses; (c) financial obligations, including all restitution ordered or recommended by any court, and debts owed by petitioner; and (d) activities since disbarment or resignation, including employment history, sources of income, civil cases or bankruptcies, criminal charges, or fraud charges levied in any legal proceedings. The information disclosed is only a starting point for the investigation.

OCTC has 120 days from the filing of the petition to complete an investigation to determine whether to oppose the petition for reinstatement. As provided in rule 5.443, the 120-day investigation period may not be extended without a finding of good cause by the State Bar Court.

Unlike applicants seeking first-time admission to the Bar, reinstatement petitioners are not required to sign a broad authorization and release that permits the Bar to obtain information about the petitioner. For applicants for admission, the authorization and release assists the Committee of Bar Examiners, and its agents, in conducting a thorough investigation to appropriately evaluate an applicant's moral character.

The proposed amendment to rule 5.441(A) would require reinstatement petitioners – that is, individuals who have been previously disbarred or resigned from the practice law – to sign an authorization and release similar to that required of applicants seeking first-time admission. Such an authorization and release will better enable OCTC to conduct a thorough investigation to appropriately evaluate the petitioner's moral qualifications for reinstatement and, where applicable, evaluate the petitioner's rehabilitation from prior misconduct.

## DISCUSSION

Rule 5.441(A) of the State Bar Rules of Procedure currently provides:

Filing Petition and Disclosure Statement. A petitioner must complete and verify a petition and disclosure statement on the forms approved by the Court and in compliance with the instructions therein. The original and three copies of the petition must be filed with the Clerk of the State Bar Court. The disclosure statement is not filed with the Court but must be served on the Office of the Chief Trial Counsel.

The proposed amendment to rule 5.441(A) would also require the reinstatement petitioner to complete an authorization and release:

Filing Petition, and Disclosure Statement, and Authorization and Release. A petitioner must complete and verify a petition and disclosure statement on the forms approved by the Court and in compliance with the instructions therein. The original and three copies of the petition must be filed with the Clerk of the State Bar Court. The disclosure statement is not filed with the Court but must be served on the Office of the Chief Trial Counsel. In addition, a petitioner must complete an authorization and release approved by the State Bar. The authorization and release is not filed with the Court but must be served on the Office of the Chief Trial Counsel.

The proposed amendment is also attached as Attachment A.

The proposed authorization and release is virtually identical to the one currently required of first-time applicants for admission to the Bar. The only substantive difference between the two is the language, discussed below, which was circulated during the second public comment period. (See Attachment B for the proposed Reinstatement Authorization and Release.)

The burden of proving good moral character is substantially more rigorous for a petitioner seeking reinstatement than for a first-time applicant for admission to practice law.<sup>1</sup> The reinstatement petitioner must present stronger proof of present honesty and integrity than a person seeking admission for the first time, whose character has never been called into question. The reinstatement petitioner's proof must be sufficient to overcome the prior adverse judgment of his character.<sup>2</sup> In order to obtain information to help the State Bar Court determine whether those difficult burdens have been met, OCTC must have the ability to access the necessary information. The proposed authorization and release will provide that ability.

This authorization and release will assist OCTC in carrying out the Bar's public protection mission by ensuring OCTC has sufficient time and ability to get records from third parties, necessary to facilitate the thorough and prompt investigation into the reinstatement petitioner's present moral qualifications and, where applicable, rehabilitation from prior misconduct. It will protect the public and promote confidence in the profession and administration of justice by allowing OCTC investigators to complete more thorough reinstatement investigations within the short time permitted. Moreover, it will help to ensure that all relevant evidence is available for presentation in a reinstatement proceeding and will, consequently, aid the State Bar Court in its determination as to whether the petitioner is, in fact, rehabilitated and morally fit to practice law. Although there are benefits in utilizing the authorization and release in lieu of a subpoena in a time-limited period for investigation, the authorization and release will be most helpful in cases where the third parties in possession of the records are beyond the reach of the Bar's subpoena power, or where a third party prefers to have an indication of the reinstatement petitioner's agreement to the release of such records.

### **First Public Comment Period**

OCTC received four public comments during the initial 75-day public comment period. After thorough review and consideration of the public comments, OCTC recommended that the Regulation and Discipline Committee recommend Board adoption of the amendment to Rule 5.441(A) and the authorization and release as circulated. A discussion of the comments and OCTC's response to those comments can be found in the report to the Regulation and Discipline Committee and the Board of Trustees for the July 2016 meeting, attached as attachment C.<sup>3</sup>

After a discussion of comments relating to the interaction of the authorization and release, as it relates to financial records, and the California Right to Financial Privacy Act, Cal. Govt. Code § 7460 et seq. (CRFPA), the Regulation and Discipline Committee, in exercising appropriate caution, requested that OGC review the language of the authorization and release. Upon

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<sup>1</sup> *In re Menna* (1995) 11 Cal.4<sup>th</sup> 975, 986.

<sup>2</sup> *Id.*; *Calaway v. State Bar* (1986) 41 Cal.3d 743, 745-746; *Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.

<sup>3</sup> The report is also available at <http://board.calbar.ca.gov/Agenda.aspx?id=11285&tid=0&show=100011405#10018320>

conclusion of its review, OGC recommended two clarifying amendments to ensure that the form fully complies with the CRFPA. In short, the CRFPA requires requests for financial records from a financial institution to be included in a subpoena that describes the records with particularity. The statute provides that a customer may sign an authorization permitting release, but the authorization must specify the period of time for which records are sought and the records that are authorized to be disclosed. That authorization must include notification that the customer has the right at any time to revoke such authorization. (Govt. Code § 7473(a), (c).) The two amendments to the authorization and release provided examples of the types of financial records subject to the authorization and release and included a more explicit notification that the petitioner has a right to revoke the release at any time.

At its September 2016 meeting, the Board of Trustees approved circulating the revised authorization and release form for an additional 30-day public comment.<sup>4</sup>

### **Second Public Comment Period**

No comments were received during the second public comment period.

Based on the foregoing, OCTC recommends that the Regulation and Discipline Committee and the Board of Trustees adopt the amendment to rule 5.441(A) and the Reinstatement Authorization and Release, as proposed. This will enable OCTC to perform the appropriate analysis to determine whether a reinstatement petitioner has met the burden of proving good moral character after having been disbarred or resigned from the practice of law.

### **FISCAL/PERSONNEL IMPACT**

None.

### **RULE AMENDMENTS**

Rule 5.441(A), Rules of Procedure of the State Bar of California, Title 5, Division 7, Chapter 2.

### **BOARD BOOK IMPACT**

None.

### **BOARD GOALS & OBJECTIVES**

Adoption of this recommendation is consistent with mission of the State Bar, as set forth in Section 6001.1 of the Business and Professions Code, which places protection of the public as the highest priority for the Bar and the Board of Trustees “in exercising their licensing, regulatory, and disciplinary functions.” It carries out Goal and Objective number 1 of the 2012-2017 Five-Year Plan – “Ensure a timely, fair, and appropriately resourced discipline and regulatory system.”

### **BOARD COMMITTEE RECOMMENDATIONS**

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<sup>4</sup> Available at

<http://board.calbar.ca.gov/Agenda.aspx?id=11327&tid=0&show=100011521&s=true#10018678>

Should the Regulation and Discipline Committee agree with the proposed amendment to Rule 5.441(A), Rules of Procedure of the State Bar of California and the Reinstatement Authorization and Release attached hereto as Attachments A and B, the following resolution would be appropriate:

The Regulation and Discipline Committee recommends that the Board of Trustees approve the following resolution:

**RESOLVED**, following publication for comment and notice and upon recommendation of the Regulation and Discipline Committee, that the Board of Trustees adopts the proposed amendment of Rule 5.441(A), Rules of Procedure of the State Bar of California, and the Reinstatement Authorization and Release, as set forth in attachments A and B, effective upon adoption.

#### **ATTACHMENTS LIST**

- A.** Proposed Amendment to Rule 5.441(A).
- B.** Proposed Reinstatement Authorization and Release.
- C.** Report to the Regulation and Discipline Committee and Board of Trustees: Proposed Amendment to Rule 5.441(A) of the Rules of Procedure of the State Bar of California Relating to the Filing Requirements for Reinstatement Proceedings. Request for Adoption Following Public Comment.